sentenced to death was a nullity. We therefore quashed the conviction and set aside the sentence. As the trial itself was also a nullity we ordered a trial *de novo*.

We think to avoid a recurrence of this technicality, it would be desirable to recommend procedure at the conclusion of a trial before the jury. On their return after retirement to consider their verdict, the following questions should be put:

1. Gentlemen, have you reached a verdict? Please answer "Yes" or "No".

   If the answer is "No", the jury should be asked to retire to reconsider and arrive at a verdict, failing which a fresh trial pursuant to section 225 will follow involving both time and expense.

2. If the answer is "Yes", Is your verdict unanimous or by a majority? Please answer without stating what the verdict is.

3. If the verdict is unanimous, what is your verdict? Please only answer "Guilty" or "Not Guilty."

4. If the verdict is by a majority, what is the majority? Please only answer without stating the verdict.

5. If the verdict is by a majority of 6 to 1 or 5 to 2. What is your verdict? Please only answer "Guilty" or "Not Guilty."

   If the verdict is by a majority of 4 to 3 and the judge decides to ask them to retire to reconsider and arrive at a majority verdict of not less than 5 to 2 one way or the other, the jury should not be asked to state their verdict. If they are asked to state what their verdict is and they proceed to do so, the judge has no option but to order a trial before another jury.

Trial de novo ordered.

Solicitors: *Kumar, Chan & Chia.*

LEE KEE CHOONG v. EMPAT NOMBOR EKOR (N.S.) SDN. BHD. & ORS.

[F.C. (Gill C.J. (Malaya), Ali and Ong Hock Sim F.JJ.) January 8, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 37 of 1974]

Companies — Shares — Value of — Assessment by independent accountants — Whether assessment can be challenged.

In this case by a consent order, it was ordered that all the shares of the appellant and his brother be purchased by all or any of the respondent at a fair and just price to be assessed by a firm of accountants to be approved by the court. On the application of the appellant Messrs. Price Waterhouse were appointed to assess the shares. Subsequently the appellant made an application that the valuation of Messrs. Price Waterhouse be rejected. The learned trial judge dismissed the application and the appellant appealed.

Held, dismissing the appeal: in the circumstances of this case there was no justification to go behind the valuation report or allow any further inquiries to be made as to the correctness or otherwise of the valuation.

Cases referred to:-

(1) *Frank H. Wright (Construction) Ltd.* v. *Freedoor Ltd.* [1967] 1 W.L.R. 506.

(2) *Collier* v. *Mason* (1858) 25 Bear. 200; 53 E.R. 613, 614.

(3) *Weeks* v. *Gallard* (1869) 21 L.T. 655.

(4) *Dean* v. *Prince* [1954] 1 All E.R. 749.

(5) *Dean* v. *Prince* [1953] 2 All E.R. 636.

(6) *Smith* v. *Gale* [1974] 1 W.L.R. 9.

(7) *Jones (M.)* v. *Jones R.R.* [1971] 1 W.L.R. 840.

FEDERAL COURT.

V. K. Palasuntharam (*R. R. Sethu* with him) for the appellant.

S. Y. Chan for the respondents.

Gill C.J. (delivering the judgment of the Court): On a Companies Winding-up petition to the High Court at Kuala Lumpur by the appellant to this appeal, Mohamed Azmi J. made a consent order on 5th July 1973 that all the shares of the appellant and his brother Lee Kee Min in Empat Nombor Ekor (Negri Sembilan) Sendirian Berhad, the first respondent company, be purchased by any or all of the remaining contributories of the company, who are the other respondents to this appeal, at a fair and just price to be assessed by a firm of independent accountants to be approved by the court.

Following the consent order there was correspondence between the solicitors of the parties regarding the appointment of a firm of independent accountants. The appellant's solicitors wrote to suggest the appointment of Messrs. Price Waterhouse & Co. This was not acceptable to the respondents' solicitors who first wrote to suggest the appointment of Messrs. Peat, Marwick, Mitchell & Co. and later the appointment of Messrs. Tan Kim Leong & Co. The appellant's solicitors did not agree.

On 6th August 1973 the appellant made an application to the court by way of summons in chambers for the appointment of Price Waterhouse. In his affidavit in support of the application, he referred to the correspondence which had passed between the solicitors for the parties and went on to say that as Price Waterhouse were completely unknown to all parties concerned and were chartered accountants of long experience and standing, they were a suitable firm to be appointed and had in fact agreed to act if all parties agreed to their appointment. He further said that Tan Kim Leong was known to him and was one of those who had in the beginning negotiated with Mr. Lim Chooi Seng, the third respondent, for the Seremban agencies and failed. In opposing the appellant's application one Chew Him Fah filed an affidavit on behalf of the respondents to say that the opposing contributories were unable to see any reasonable objection to the appointment of Peat, Marwick & Mitchell as independent valuers.

In the event, Mohamed Azmi J. made an order appointing Messrs. Price Waterhouse & Co. and he made a further order that they be at liberty to have access to all bills, papers, vouchers, accounts and other documents of the company which they considered relevant for the purpose of carrying out the valuation of the shares.

By a letter dated 1st December 1973 Price Waterhouse & Co. informed the appellant's solicitors that they valued the shares of the appellant and of his brother in the first respondent company at $184/- per share. Thereafter the appellant's solicitors had an

interview with another firm of chartered accountants known as Robert Lim, Kwang & Co. who on 22nd January 1974 sent a letter to the appellant's solicitors to say they valued the shares at $657/- per share.

On 4th February 1974 the appellant made an application to the court that the valuation of Price Waterhouse be rejected and that such other order as the court may deem fit be made as to the valuation of the share. The application was supported by the appellant's affidavit in which he stated that the valuation by Price Waterhouse was wholly erroneous and misconceived, that in order to determine the fair and just price of the shares of the company a special audit of the company's accounts ought to be had and all improper expenditure and bonuses to directors and agents be taken as part of the profits, and that the premium paid on the shares and the unclaimed price moneys should also be taken to be part of the profits and the shares valued as shares of a going concern.

In opposing the application Chew Him Fah stated in his affidavit that Price Waterhouse were appointed as independent valuers on the insistence of the appellants, that the accounts on which Price Waterhouse based their valuation had been duly audited, that neither the appellant nor his brother had objected to the accounts which were presented and passed at the annual general meetings held each year and that Robert Lim, Kwang & Co. had not stated how they arrived at their valuation of $657/- per share.

This application too came up for hearing before Mohamed Azmi J. As stated in his grounds of judgment, the learned judge dismissed the appellant's application on the following three grounds:—

(1) Since the appointment of Price Waterhouse & Co. was made at the insistence of the petitioner who had vouched for their experience and impartiality, it was unjust that the appellant should reject their valuation as wholly erroneous and misconceived.

(2) The appellant's opinion of the value of the shares could not be accepted against the expert opinion of Price Waterhouse & Co. whom he himself had chosen.

(3) The fact that the valuation made by Robert Lim, Kwang & Co. gave a higher price to the shares did not constitute sufficient ground for allowing the appellant's application in the absence of any specific allegation of partiality or any improper conduct on the part of Price Waterhouse.

It was from the order of dismissal of this application by Mohamed Azmi J. that the appellant brought his appeal to this court.

At the hearing of the appeal, counsel for the appellant sought to adduce further evidence under section 69 of the Judicature Act 1964, which he contended he was entitled to do without leave of the court on the ground that the order appealed from was an interlocutory order. We ruled that the order was a final order and refused leave to adduce further evidence, as such further evidence was available to the appellant when the application to set aside the valuation of Price Waterhouse was made.

On the merits of the appeal, it was contended that the reference to Price Waterhouse for a valuation of the shares was made without jurisdiction. This point had not been raised in the court below, but we allowed it to be taken as it raised the question as to whether the court had jurisdiction to make the order appointing a firm of accountants instead of a single person for the purposes of a valuation report. But we rejected this contention as there have been cases, e.g., *Frank H. Wright (Construction) Ltd.* v. *Fredoor Ltd.*,[1] in which a firm of accountants was appointed as valuers and nothing was said about that being wrong.

The main ground of appeal was that the learned judge misdirected himself in dismissing the appellant's application for the reasons which he had stated. The other grounds of appeal, which are inter-related, were that the learned judge failed to attach sufficient importance to the valuation of Messrs. Robert Lim, Kwang & Co., that he failed to direct his mind to and appreciate the fact that the valuation of Price Waterhouse was so inadequately small that it could have been arrived at only on the erroneous principle that the company was not a going concern, and that he failed to appreciate that as the appellant had challenged the accuracy of the audited accounts of the company in the petition for winding up, the valuers had erred in basing their valuation on those accounts.

In dealing with all these grounds we had to consider the test to be applied in such cases as laid down in decided cases. In *Collier* v. *Mason*[2] Sir John Romilly M.R. said:

"I cannot satisfy myself that I should be correct in saying that this is a contract which cannot be specifically performed. It is not proved that Mr. Englehart did not exercise his judgment and discretion in the best way he could. It may have been improvident as between these parties to enter into a contract to buy and sell property at a price to be fixed by another person, but that cannot avoid the contract. Here the referee has fixed the price, which is said to be evidence of miscarriage, but this court upon the principle laid down by Lord Eldon, must act on that valuation, unless there be proof of some mistake, or some improper motive, I do not say a fraudulent one; as if the valuer had valued something not included, or had valued it on a wholly erroneous principle, or had desired to injure one of the parties to the contract; or even, in the absence of any proof of any one of these things, if the price were so excessive or so small as only to be explainable by reference to some such cause; in any one of these cases the court would refuse to act on the valuation. But I am satisfied that it is not so here, the price does not come up to that; one person, it is true, has valued the property at £2634. and another at £2834, and it is said that the valuation of Mr. Englehart is nearly double; but I have frequently had to refer to the enormous discrepancy in *bona fide* valuations, when it is known by each valuer for what purpose the property is to be valued; it is impossible in such cases to avoid a species of bias. I find that £3100 was offered for the property and refused, and this is a test that the vendor did not consider that to be the value. The plaintiff said he would not take less than £3500, and swears that he laid out £5200 on the property exclusive of the fixtures, and the valuation is £4957. It does appear to me a very high and perhaps an exorbitant valuation, but I cannot say it amounts to evidence of fraud, mistake or miscarriage."

In *Weeks* v. *Gallard*[3] Lord Romilly had this to say: —

"This is a very unfortunate case, assuming the property to be valued too low, which seems probable. But that is no defence to the plaintiff's suit. The plaintiff and the defendant agreed to be bound by the valuation of two persons named in the agreement, and it is the duty of the court to enforce specific performance of such agreements. The court has really no discretion in the matter. The discretion of the court is bound, as Lord Ellenborough says, by fixed rules. In one case of this kind a house and furniture were valued at three times their value, and yet there was a decree for

specific performance. The only defence to such a suit would be fraud or collusion. There is no proof here that the valuers did not value the property as fairly as they could; there is no suggestion of fraud or collusion. There must, therefore, be a decree for specific performance of the contract with costs."

The test laid down in *Collier* v. *Mason* was cited with approval by the Court of Appeal in *Dean* v. *Prince*.[4] That was a case in which the articles of association of a private company provided that a deceased director's shares could be purchased by the surviving directors at a price to be certified by an auditor as a fair value. A director who held a controlling interest in the company died. The auditor, having made a certified valuation, stated in writing that for the purpose of his valuation he had not regarded the company as a going concern but that he had valued on "a break-up" basis, because in his opinion the shares had no value on any other basis, having regard to the losses made by the company. At the trial before Harman J. a preliminary point was taken on the part of the defendants that the valuation was unchallengable in the courts since the shareholders had by the articles submitted the matter in question to the exclusive arbitriment of the auditor. The learned judge disallowed this objection on the ground that by stating the reasons which had led him to arrive at his valuation, Mr. Jenkinson had exposed his certificate to examination by the courts into the validity of such reasons. There was no appeal from that part of the learned judge's judgment. The judge then proceeded to consider the basis of Mr. Jenkinson's valuation, and concluded in favour of the plaintiff that he, Mr. Jenkinson, had fallen into an error on a matter of principle or had made a material mistake in arriving at his figure, and so declared that the plaintiff was not bound by the certificate.

It was against that part of the learned judge's judgment that the defendants appealed. The Court of Appeal held that a valuation could be impeached, not only for fraud but also for mistake or miscarriage of justice, e.g., if the expert made an arithmetical error or took something into account which he ought not to have taken into account or vice versa, or interpreted the agreement wrongly, or proceeded on some erroneous principle; even if the court could not be bound to actual error, nevertheless if the figure itself was so extravagantly large or so inadequately small that the only conclusion was that the expert must have made some error, the court would interfere; but, on the facts, bearing in mind particularly the precarious nature of the company's tenure of its premises, it could not be said that the auditor had erred, and, therefore, his valuation ought not to be disturbed. In other words, it was held that the auditor had correctly rejected the "going-concern" basis of valuation, as the company had no expectation of profit making.

The dictum of Harman J. in *Dean* v. *Prince*[5] was not followed in *Smith* v. *Gale*[6] in which it was held that the accountant's certificate, having been founded on a mistaken interpretation of the agreement, was not binding on the plaintiff and the court had jurisdiction to go behind the certificate and correct the value shown therein. In *Jones (M)* v. *Jones R.R.*[7] Ungoed Thomas J. said that where a valuation is made on an erroneous principle, the valuation is vitiated and cannot be relied on even though it is not shown that the resultant valuation figure is wrong. That was a case in which the shares in the company and the assets were to be valued "as between a willing vendor and a willing purchaser of a business being carried on as a going concern," the valuation of the shares being directed to be made on "an assets basis."

In the present case Price Waterhouse did not state in their valuation report the reasons which had led them to arrive at their valuation. There were no directions to them as to whether they were to value the shares on a going-concern basis or on the basis of a break-up valuation. There was nothing to suggest on what basis Robert Lim, Kwang & Co. arrived at their very much higher valuation of the shares. The order appointing Price Waterhouse directed that all the relevant accounts and books of the company were to be made available to them. This was done, and quite clearly their valuation was based on all the accounts, the accuracy of which had never been challenged by the appellant.

In all the circumstances of the case we could find no justification to go behind the valuation report or allow any further inquiries to be made as to the correctness or otherwise of such valuation. We therefore dismissed the appeal with costs.

Appeal dismissed.

Solicitors: *Chin, Sethu & Co.; S. Y. Chan & Co.*

SUNGAI WANGI ESTATE v. UNI

[O.C.J. (Eusoffe Abdoolcader J.) February 3, 1975]
[Ipoh — Originating Summons No. 71 of 1974]

Administrative Law — Award of Industrial Court — Error on the face of the record — Decision voidable — Application for declaration — Whether court can make order — Whether proceedings properly brought by originating summons — Misconduct of worker — Whether there has been condonation — R.H.C., 1957, O. 25 r. 5 and O. 54A r. 1 — Industrial Relations Act, 1967, s. 29(3).

In this case the facts were that the manager of the Sungai Wangi Estate had received certain complaints against the respondent but it appeared that after interviewing him he was convinced that the respondent was innocent and the respondent was merely transferred to another post. Subsequently further complaints were received against the respondent and an inquiry was instituted and eventually the respondent was dismissed. The matter was referred to the Industrial Court by the Minister and the Industrial Court decided that there had been condonation by the applicant against the respondent. The applicant applied by originating summons for a declaration that there was an error on the face of the record of the Industrial Court and that the award was invalid.

Held: (1) the court was precluded from making the declaration sought for mere error of law on the face of the record which did not result in any jurisdictional defect so as to make the award of the Industrial Court a nullity;

(2) where there was an error on the face of the record the correct and appropriate procedure would in the circumstances have been an application for an order of *certiorari* to quash the award;

(3) as no question of construction arose in this case, the proceedings should have been brought in the form of an action commenced by writ and not by originating summons.